86-766

No.

IN THE SUPREME COURT OF THE UNITED STATES

1986 TERM

AIRLINES TRANSPORTATION COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT (HEREIN "THIRD CIRCUIT") PROPERLY AFFIRMED THE ORDER OF THE NATIONAL LABOR RELATIONS BOARD (HEREIN "NLRB") AND GRANTED THE NLRB'S APPLICATION FOR ENFORCEMENT.

II. WHETHER SUBSTANTIAL EVIDENCE SUPPORTS THE NLRB'S CONCLUSION THAT EMPLOYEE PAUL CONWAY (HEREIN "CONWAY") WAS DISCHARGED FOR ENGAGING IN PROTECTED CONCERTED ACTIVITY IN VIOLATION OF SECTION 8(a)(1) OF THE NATIONAL LABOR RELATIONS ACT, 29 U.S.C. SEC. 151, ET SEQ. (HEREIN "THE ACT").

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TABLE OF AUTHORITIES

OPINIONS BELOW

The Judgment Order of the United States Court of Appeals for the Third Circuit affirming the Order of the National Labor Relations Board granting the application for enforcement. Both Orders are set forth in the Appendix herein beginning at Page 1a.

STATEMENT OF JURISDICTION

On August 7, 1986, the Third Circuit entered a judgment order affirming the order of the NLRB and granted the NLRB's application for enforcement of its order which is reported at 277 NLRB No. 37.

This Court has jurisdiction to review the jdugment order of the Third Circuit by virtue of 28 U.S.C. Section 1254 and 29 U.S.C. Section 160(e).

STATUTES INVOLVED

29 U.S.C. Section 157:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any and

all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

29 U.S.C. Section 158(a):

It shall be an unfair labor practice for an employer - (1) to interfere with, restrain , or coerce employees in the exercise of the rights guaranteed in Section (7) (29 U.S.C. Section 157).

STATEMENT OF THE CASE

ATC operates a limousine and bus service for the purpose of transporting airline passengers between Greater Pittsburgh International Airport (herein "GPIA") and various hotels in the Pittsburgh, Pennsylvania area. Drivers for ATC, including Conway, are represented by Taxicab Drivers Local Union No. 128, a/w International Brotherhood of Teamsters, Chaffeurs, Warehousemen and Helpers of America (herein "Union"). At all times relevant hereto, ATC and the Union were parties to a collective bargaining agreement dated July 6, 1979.

On November 6, 1981, Conway began word at 1:15 P.M. and was scheduled to end his shift at 9:45 P.M. After making several trips on this date, at approximately 5:45 P.M. he arrived at the Sheraton Inn South, a suburban hotel located nineteen miles from GPIA. Service from the Sheraton to GPIA was

scheduled to leave at 6:00 P.M. in order to arrive at GPIA at 6:30 P.M., with a return trip from GPIA to the Sheraton at 7:00 P.M.

Upon his arrival, Conway called the ATC dispatcher to inquire if there were any 6:00 P.M. passengers for the trip to GPIA. He was told there was a passenger to be picked up. However, no one was at the stop. At 6:05 P.M., Conway again called the dispatcher and was informed that the 6:00 P.M. passenger had canceled. Conway was instructed to return to GPIA. However, Conway failed to return to GPIA when instructed. Instead, he made a personal telephone call. As a result, Conway did not arrive at GPIA until 6:55 P.M. when he had been expected much earlier.

Upon his arrival at GPIA, Conway was informed that there were four or five passengers for the 7:00 P.M. return trip to the Sheraton. Conway refused to take this trip, insisting that he was going to take his thirty-minute lunch break. Under the terms

of the collective bargaining agreement, employees are entitled to a thirty-minute lunch break between the fourth and sixth hours of work. Conway told his supervisor, "Do what you want with them, cab them or helicopter or whatever, I'd like my lunch hour; I'm due for lunch." Conway claimed the reason he was insisting on his lunch break was that he did not want to work overtime while other drivers were laid off. It is unclear how overtime would have been involved. Conway was told he could take a fifteen-minute lunch and leave at 7:15 P.M., but he insisted on a full thirty-minute break.

Another ATC supervisor tried to persuade Conway to take the passengers to the Sheraton. Conway told the supervisor, "I don't care what he does with those passengers. . . that's not my problem; it's theirs." Due to Conway's refusal to make the trip, the passengers were cabbed to their destination at 7:20 P.M.

On November 12, 1981, Conway was questioned regarding his conduct on November 6, 1981, at a grievance meeting. Following the meeting, Conway was terminated. The Union chose not to arbitrate the legitimacy of Conway's discharge.

Based on the above, the NLRB concluded that ATC violated Section 8(a)(1) of the Act by discharging Conway. Thereafter, the NLRB applied to the Third Circuit, pursuant to Section 10(e) of the Act, for enforcement of its order. The Third Circuit granted that application.

REASONS FOR GRANTING THE WRIT

Section 8(a)(1) of the National Labor Relations Act makes it an unfair labor practice for an employer "to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7." Section 7 of the Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."

The NLRB found that ATC violated Section 8(a)(1) by discharging Conway for insisting upon his contractual right to take his lunch break. In reaching this conclusion, the NLRB relies upon the Supreme Court's decision in NLRB v. City Disposal Systems, 104 S. Ct. 1505 (1984).

City Disposal held, in a 5-4 decision, that "concerted activities" includes an honest and reasonable assertion by an individual employee of a right grounded in a collective bargaining agreement. That case involved an employee who refused to drive an unsafe vehicle pursuant to the collective bargaining agreement which specifically granted a right to refuse to drive unsafe vehicles.

I. Conway's Activity Was Not Concerted.

Under City Disposal, in order to constitute "concerted activity" the individual employee's assertion of a contract right must be "honest and reasonable." The Court stated:

> "As long as the employee's statement or action is based on a reasonable and honest belief that he is being, or has been, asked to perform a task that he is not required to perform under his collective bargaining agreement, and the statement or action is reasonably directed toward the enforcement of a collectively bargained right, there is no justification for overturning Board's judgment that the employee is engaged in concerted activity,

> just as he would have been had he filed a formal grievance." (at p. 1514).

In the instant case, there is no question that employees are entitled to a lunch break. However, in the circumstances herein, Conway's assertion of his right to a lunch break was not reasonable. First, he had already taken a 15-minute break when he admittedly made a personal telephone call at approximately 6:05 P.M. Had he not taken the time to make the call, he would have returned to GPIA, as he had been instructed to do, in plenty of time to take his lunch break and be ready to take the 7:00 P.M. trip. Regardless of which version of the delay is accepted, i.e., when the phone call occurred vis-a-vis the encounter with the passenger, the delay was occasioned by Conway's failure to follow the instructions he received at 6:05 P.M. to return to GPIA.

As a long-term employee, Conway would have been fully aware of the necessity to

provide timely service to airline passengers. Yet, Conway disregarded ATC's interest in this regard. In Conway's view, it was ATC's problem, not his problem, that passengers would have to find another means of transportation.

Second, Conway's assertion of his right to a lunch break was not reasonably directed toward the enforcement of a collectively bargained right. In Conway's own testimony, he noted that he was relying upon his right to a lunch break, in effect, as a ruse, to protest a condition completely unrelated to lunch breaks. He wanted to protest the fact that 4 of ATC's 36 drivers were on lay-off status.[1] Accordingly, his conduct would not be deemed "concerted."

Lastly, as the Court noted in City Disposal, at some point an individual employee's action may become so remotely related to

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[1]The lay-offs were due to a decline in passengers resulting from the Air Traffic Controllers strike.

the activities of fellow employees that it cannot reasonably be said that the employee is engaged in concerted activity, e.g., it would not be a violation of the National Labor Relations Act to discharge an employee for purely personal "griping." See, City Disposal at 1512, note 10.

In the instant case, that Conway's insistence on his lunch break in order to protest the fact that employees were on lay-off status was so remotely related to the activities of his fellow employees can be seen from the fact that his position does not even make sense. There is no connection between Conway's right to a lunch break and the lay-off status of other employees. Conway tried to establish some link between the two by claiming overtime was somehow involved, but his explanation also makes no sense. Although the NLRB claims overtime would have been involved, there is no explanation or basis for such a finding.

What does make sense is the fact that by insisting on his lunch break at that particular time, Conway was setting the stage to obtain an early quit. This would have been accomplished by waiting to take the 8:00 P.M. trip from GPIA. However, this effort was foiled by ATC requiring Conway to "shift," i.e., drive without passengers to the Sheraton, at 7:30 P.M. in order to take the 8:00 P.M. return trip from the Sheraton.

Based on the above, applying the principles set forth in City Disposal, Conway's conduct would not constitute "concerted activity." Moreover, the dissenting opinion in City Disposal demonstrates that City Disposal was improperly decided and that such individual conduct does not constitute concerted activity. Accordingly, ATC respectfully requests that this Court reconsider its decision in City Disposal.

II. Conway's Conduct Was Not Protected.

Assuming arguendo that Conway's action was "concerted," not all "concerted activity"

is protected. As noted by the Court in City Disposal, the only issue presented was whether the activity was "concerted", not whether it was protected. For instance, an employee may lose protection if he engages in concerted activity in an abusive manner. See, City Disposal at 1516.

In the instant case, Conway refused to take the 7:00 P.M. run when instructed to do so. Such refusal constituted a work stoppage.

The collective bargaining agreement between ATC and the Union provides for a grievance-arbitration procedure to resolve all disputes. Under Teamsters Local 174 vs. Lucas Flour, 369 U.S. 95 (1962), such a provision creates, by implication, a no-strike provision. Thus, employees of ATC have waived their right to engage in work stoppages. Accordingly, Conway's refusal to perform services constitutes a breach of the no-strike provision and as such, renders his conduct unprotected.

As noted in City Disposal at 1516, no-strike provisions are a common mechanism whereby parties agree employees will not invoke their rights by refusing to work. "In general, if an employee violates such a provision, his activity is unprotected even though it may be concerted." See Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956). See also, Suburban Transit Corporation v. NLRB, 536 F.2d 1018 (CA 3 1976), and Food Fair Stores, INc. v. NLRB, 491 F.2d 388 (CA 3 1974).

In Suburban Transit the issue presented was whether the collective bargaining agreement expressly or impliedly prohibited strikes. As this Court noted:

> ". . . it is well-settled that strikes carried out in violation of a no-strike provision in a collective bargaining agreement are not afforded the protection of Section 7 and that a discharge of employees who engage in such strike does not constitute an unfair labor practice." (at 1020).

The grievance-arbitration language involved in Suburban Transit, wherein this Court found such language to prohibit strikes, is similar to the language contained in the ATC collective bargaining agreement. Accordingly, ATC's employees have waived their right to strike and by engaging in a work stoppage, Conway was engaged in unprotected activity.

More importantly, in Conway's own view, he was refusing to work, not because he wanted to eat lunch, but because he wanted to protest the lay-offs of other drivers. Clearly, the collective bargaining agreement does not provide for such a right. To the contrary, the collective bargaining agreement requires employees to utilize the grievance-arbitration procedure to resolve their disputes with management.

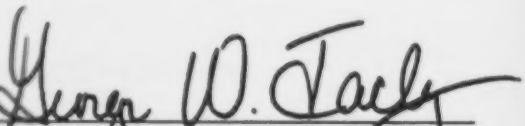
In Emporium Capwell Co. v. WACO, 420 U.S. 50 (1975), employees by-passed their contractual grievance procedure to protest

the employer's alleged discriminatory practices. The Court held such conduct to be unprotected. Similarly, Conway's conduct in by-passing the grievance procedure in order to protest the lay-offs of other drivers was unprotected. Accordingly, ATC did not commit an unfair labor practice by discharging him.

CONCLUSION

For the foregoing reasons, Petitioner requests this Honorable Court to issue a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

By 

George W. Jacoby, Esq.
Attorney for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-3710

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

AIRLINES TRANSPORTATION COMPANY,
Respondent.

On Application for Enforcement
of an Order of the
National Labor Relations Board
(NLRB NO. 6-CA-15129)

Submitted Under Third Circuit Rule 12(6)
July 30, 1986

Before: ALDISERT, Chief Judge, and
HIGGINBOTHAM, Circuit Judge, and
RE, Chief Judge.*

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*Honorable Edward D. Re, Chief Judge, United States Court of International Trade, sitting by designation.

JUDGMENT ORDER

After consideration of all contentions raised by petitioner, it is

ADJUDGED, ORDERED and DECREED that the order of the National Labor Relations Board be affirmed and the application for enforcement is granted.

Each party to bear its own costs.

BY THE COURT,

s/A. Leon Higginbotham
Circuit Judge

Attest:

s/Sally Mrvos
Sally Mrvos, Clerk

DATED: AUG 7 1986

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

AIRLINES TRANSPORTATION COMPANY

and Case 6--CA--15129

PAUL L. CONWAY, an Individual

Michael Poprik, Esq., for the General Counsel
Timothy E. Finnerty, Esq., of Pittsburgh, PA, for the Respondent.

DECISION

Statement of the Case

MARION C. LADWIG, Administrative Law Judge. This case was tried at Pittsburgh, Pennsylvania, August 10, 1982. The charge was filed by Paul Conway December 2, 1981,[1] and the complaint was issued January 28, 1982. Conway and other airport limousine drivers were complaining about working overtime and through their contractual 30-minute lunch period while four

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[1]All dates are in 1981 unless otherwise indicated.

drivers were laid off during the air traffic controllers strike. To make this point, Conway insisted on taking his lunch break, causing him to miss a trip. The primary issues are whether he was engaged in protected concerted activity and whether the Company, the Respondent, unlawfully discharged him in violation of Section 8(a)(1) of the National Labor Relations Act.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and the Company, I make the following

Findings of Fact

I. Jurisdiction

The Company, a Pennsylvania corporation, transports passengers intrastate between the airport and various locations in Pittsburgh, Pennsylvania, where it annually derives gross revenue exceeding

$500,000 and receives goods valued over $2000 directly from outside the State. The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

A. Background

Limousine driver Paul Conway had been employed 15 1/2 years and had a spotless record.

Because of reduced business during the air traffic controllers strike, which began in August, the Company had its first layoff in 36 years, laying off 4 of its 36 drivers (Tr. 181). In general discussions among all the limousine drivers, Conway and others stated they did not feel they should be required to work overtime or through their lunch period on the "skeleton crew" while the

men were laid off (Tr. 31--32, 76) and that "it was unfair, it wasn't right to be working overtime while there were men laid off" (Tr. 90--91). They complained to their driver representative that they were doing the work of the laid-off men, sacrificing their lunch periods and working overtime (Tr. 126--127). It is undisputed that management was aware of this complaining, from employee complaints at the dispatcher level (Tr. 91--92).

The collective-bargaining agreement provides for overtime at time and a half after 8 hours a day, and also provides that employees "will have" a nonpaid one-half-hour lunch period "to be taken between the fourth and sixth hours of work" (G.C. Exh. 2, art. IV,A).

The Company admitted at the trial that overtime is not mandatory (Tr. 180), and admitted at page 8 of its brief that "If a driver does not wish to waive his

lunch period, he will be permitted to go to lunch without receiving warning, reprimand or discipline."

B. Conway's Discharge

1. Insisting on lunch period

On Friday, November 6, Conway went to work at 1:15 P.M. and was due his 30-minute lunch period by 7:15 P.M.

On his third trip from the airport, he arrived at the Sheraton South (19 miles away) about 5:45. At 6:05 he reported to his dispatcher that the 6 o'clock passenger was a no-show, and the dispatcher instructed him to return empty to the airport. Upon approaching his limousine, however, Conway saw the tardy passenger, who had already placed his luggage in the limousine (Tr. 13). The passenger asked Conway to wait a few minutes while he finished his dinner (Tr. 15--16). Conway agreed to wait, and while doing so, placed a telephone call (to Supervisor John

Colosimo's brother about flight instruction (Tr. 16)). Conway then drove the passenger to the airport, arriving about 6:55, and took his lunch break from 7 to 7:30.

Not being informed of the delay at the Sheraton South, Dispatcher John Koehler had planned to assign Conway to take the 7 o'clock trip back to the hotel. Both Koehler and Supervisor Colosimo attempted to persuade Conway to take only a 15-minute lunch break and then take the five waiting passengers, but he refused. He insisted on taking his full 30-minute lunch period, stating that he wanted to make the point that "we should not work overtime while we had men laid off." (Tr. 17--19, 36, 41, 46--47, 143--144, 155--156, 161, 164, 169--171, 173.)

Because of the Company's policy of not having passengers wait as long as

30 minutes (Tr. 146, 171), Dispatcher Koehler ordered a taxicab for the five passengers sometime between 7:15 and 7:20. (At the limousine rate of $56.65, the passengers paid a total of $28.25 for the taxi ride. By a bookkeeping entry, the related taxicab company charged the Company the taxi fare of $24.)

There were no waiting passengers at 7:30 when Conway finished his 30-minute lunch break. Shortly after 7:30 he was shifted to the Sheraton South to make the 8 p.m. return trip.

2. His discharge

On Monday, November 9, Chief Dispatcher Roy Dietz notified Conway by telephone that President James Sinnott had ordered him held off work for refusing a trip. Conway denied refusing a trip, stating "I just insisted on my lunch hour, because I was due for lunch ac-

cording to the contract." Dietz then said that a meeting with Sinnott was set for Thursday, November 12. (Tr. 20.)

On November 12, Teamsters Local 128 President William Carson, Steward Paul Dinert, and Conway met with Company President Sinnott and Claims Manager Robert Napolitan. Sinnott opened the meeting by giving them statements by Dispatcher Koehler and Supervisor Colosimo to read (G.C. Exhs. 3 and 4). Both statements reported that Conway had refused to make the 7 o'clock trip to make or prove a point. Sinnott asked Conway for his reply. Conway recounted what happened and admitted insisting on taking his lunch period to make a point (Tr. 24--28, 58--61). (As credibly testified by Conway, who appeared to be an honest, forthright witness, he told Sinnott in the meeting (Tr. 27) that he made the telephone call while waiting for the

passenger, not before the passenger appeared as claimed in Koehler's statement and as claimed by both Koehler (Tr. 143, 149) and Napolitan (Tr. 200, 202) at the trial. Koehler and Napolitan, as well as Colosimo, impressed me by their demeanor on the stand as being willing to give any testimony that would help the Company's cause.)

President Sinnott asked, "What's the point you're trying to make?" (as recalled by Conway (Tr. 28), or "What are you trying to prove?" as recalled (Tr. 61) by Local President Carson). After Conway explained, "I don't feel we (emphasis supplied) should have to work overtime when men are laid off" (Tr. 28), Sinnott stated, "Well you proved your point, you no longer work for this Company" (Tr. 61), "You're discharged for insubordination" (Tr. 25). Steward Dinert protested that Conway had been a driver for 15 1/2 years and this was pretty severe punishment for

a one-time offense. Local President Carson pointed out that it was the driver's prerogative under the contract to take his lunch period between the fourth and sixth hours of work. Speaking to Conway, Sinnott responded that 16 years of service "does not give you the right to tell me how to run the Company." (Tr. 25--26, 61--63). Sinnott thus converted the November 6 suspension into a discharge.

On November 13, Claims Manager Napolitan prepared a letter to the Union for President Sinnott's signature (Tr. 206), stating that Conway was dismissed for just cause and that Conway, "due to delaying tactics. . . did not arrive until 6:55 P.M. and insisted that he be given his lunch break even though he was needed to make a trip and informed his supervisor that he could cab passengers to their destination." In his January 28, 1982 pretrial affidavit (G.C. Exh. 6), Napolitan ex-

plained the discharge by stating that Sinnott informed Conway at the November 12 meeting "that he was being discharged for refusal to work, that refusal to take a trip was insubordination." In its answer (G.C. Exh. 1(e)), filed February 5, 1982 (over 6 months before trial), the Company asserted that its action in dismissing Conway "was due to the action of the Employee in failing to take a direct order from his supervisor and causing the Respondent to provide alternate means of transportation for its customers."

The General Counsel contends that Conway was discharged for making the point and bringing to the Company's attention, by insisting on his contractual lunch period, "the group complaint of Respondent's drivers that it was unfair of Respondent to expect them to work overtime while their fellow drivers were laid off."

C. Shifting Defense

By the time of trial, the Company had fabricated the defense that it had discharged Conway, not for refusing to take the 7 o'clock passengers during his 30-minute break but for refusing to take them at 7:30, after the lunch break.

Thus, Claims Manager Napolitan falsely testified that "There was no problem about [Conway's] taking his lunch between the fourth and sixth hours. The problem was he refused to take the passengers after lunch: (Tr. 208); "What he was discharged for was the refusal to take the passengers after seven thirty. That's what Mr. Sinnott was upset about." (Tr. 204). Napolitan falsely denied that Conway stated at the November 12 meeting that he refused to take the passengers because he wanted to take his lunch (Tr. 212), despite Napolitan's admission in

his pretrial affidavit, "Conway stated that he refused to take the passengers because he wanted to take his lunch."

Supervisor Colosimo also gave false testimony to support this fabrication, although at one point he deviated from the defense. When questioned about his conversation with Conway (about 7:10 when Dispatcher Koehler sent Colosimo over to persuade Conway to take only a 15-minute lunch break), Colosimo admitted that Conway responded, "I want to have my lunch and then I'll go" (Tr. 169). Appearing to realize that this answer would undercut the Company's defense, Colosimo quickly changed his testimony and later claimed, "He led me to believe he wasn't going to take the passengers (Tr. 173). He further claimed on cross-examination:

> Q. Mr. Conway told you that he did not desire to take the people at seven thirty?
>
> A. Yes.

Q. He did not say he would not take the people at seven thirty?

A. He said he didn't care how we got the people there.

. . . .

Q. That he didn't care how you got the people there, that he was taking his lunch until seven thirty?

A. Yes. [Tr. 174.]

(I note that in his pretrial affidavit (G.C. Exh. 4), Colosimo stated that Koehler asked him to talk to Conway about making the trip "after he was off lunch," but that Conway "said he didn't want any overtime" ---obviously referring to Conway's refusal to accept overtime pay for the last 15 minutes of an abbrieviated lunch period and to take the passengers at 7:15. Colosimo admitted at the trial (Tr. 164) that he was asking Conway at 7:10 to take the passengers then instead of waiting until 7:30, and Koehler admitted (Tr. 161) that Conway was refusing to take the passengers at 7:15.)

Also in support of the Company's belated defense, Dispatcher Koehler claimed that he would not have sent the passengers by taxicab but would have waited 30 minutes until after Conway's lunch period if Conway had said he would take the passengers then (Tr. 148), and that the only reason he did not wait was his belief that Conway would refuse at 7:30 to carry them (Tr. 159--160). I discredit this testimony as an obvious fabrication. The Company had a policy against having passengers wait 30 minutes. Supervisor Colosimo admitted: "We don't really make it a point to make people wait a half hour. . . Five or ten minutes people don't mind, but . . . a half hour. We would lose the business, people would get cabs or rent a car or something" (Tr. 171). Furthermore, Koehler was working under the supervision of Chief Dispatcher Dietz, who candidly admitted at the trial that he would expect the

dispatcher to call a cab rather than wait for the driver to take his (30-minute) lunch break (Tr. 195--196).

I discredit the testimony that Conway refused to carry the passengers after his 30-minute lunch break, and credit his denial (Tr. 46) and his testimony that of course he would have taken the passengers at 7:30 if they were still waiting "because I was making the trip anyhow" (Tr. 19).

I therefore find without merit the Company's contentions, at pages 15 and 16 of its brief, that Conway "was discharged for his refusal to take the passengers at 7:30 P.M.," and that "management reasonably believed that [Conway] blatantly refused to take the pasengers even after a half-hour lunch period."

D. Other Defenses

The Company concedes in its brief

that "arguably the Complainant [Conway] did show empathy among the drivers on the matter of layoffs," that "Conway testified that during the three months preceding his termination he and other employees discussed their dissatisfaction with the ramifications of the layoff," and that "the Complainant may have had conversations relating to the employees' interests" (R. brief 6, 9, 14). Yet the Company argues: "It is clear from the testimony presented that the Complainant's activity was solely for his own benefit" (R. brief 8). Neither the brief nor the evidence, however, reveals any personal interest or motivation that Conway may have had for insisting on his lunch break other than his making common cause with other limousine drivers who were complaining about working shorthanded and doing the work of laid-off employees by working overtime and through their lunch period.

The Company contends that "the Complainant failed to elicit testimony showing that he had united with other employees or acted individually in an attempt to change the terms and conditions of [employment at] the Respondent," and "The facts and testimony do not substantiate any argument that he was dismissed because he attempted to enforce any contractual provision" (R. brief 5, 11--12). To the contrary, the evidence is clear that he was discharged for "insubordination" when he exercised his admitted contractual right to take the 30-minute lunch break for an obvious purpose of inducing the Company to reinstate one or more of the laid-off drivers. As found, President Sinnott told Conway at the time of the discharge that he did not have "the right to tell [Sinnott] how to run the Company."

The Company argues that its dismissal of Conway "was based upon its mastery

of its own business affairs" and "It is not in the Respondent's interest to retain employees who choose to 'make a point' only to vindicate personal motives" (R. brief 14, 19). To the contrary, when asked "What's the point you're trying to make?" Conway told President Sinnott, "I don't feel we the limousine drivers should have to work overtime when men are laid off." It is evident that Sinnott was concerned with Conway's effort to induce him to reinstate laid-off employees.

Finally, the Company argues "That there was no protected concerted activity which precipitated the dismissal," that "It was Complainant's insubordination rather than any alleged concerted activities that led to his termination," and "That any alleged protected conduct was not causally related to the Respondent's action" (R. brief 5, 20).

E. Concluding Findings

The Company admits that before the unprecedented layoff of four limousine drivers, the drivers had been permitted to take their full 30-minute lunch periods "without receiving warning, reprimand or discipline."

On this occasion, however, drivers were complaining among themselves and to management that it was unfair for them to be working overtime while men were laid off, and limousine driver Conway insisted on taking his full lunch break, causing him to miss a trip. When he explained to President Sinnott that he did so to "make a point" that he did not feel the drivers should have to work overtime when men were laid off, Sinnott discharged him for insubordination, telling him he did not have "the right to tell [Sinnott] how to run the Company."

After considering all the evidence and circumstances, I find that the Company

was aware that Conway's conduct was related to group action in the interest of the employees, Mushroom Transportation Co. v. NLRB, 300 F.2d 683, 685 (3d Cir. 1964), and that the Company discharged him for engaging in concerted activity for the purpose of mutual aid or protection. Limousine drivers were laid off for the first time in 36 years. The Company was aware, from employee complaints at the dispatcher level, that drivers were protesting the layoffs and were opposed to working overtime while fellow drivers were still laid off. The drivers had the admitted contractual right to insist on taking their full 30-minute break, even if no one else was available to take a trip, but Conway was the first driver to exercise that right during the layoffs to "make a point" that the drivers should not have to do the work of laid-off employees by working overtime.

It was under these circumstances that the Company fabricated the defense that it discharged Conway for refusing to take the passengers after his 30-minute break, rather than for missing a trip by insisting on his contractual right to take his lunch break. I infer that the Company shifted its defense at the trial to conceal its determination to rid the Company of Conway (despite his senior status and his spotless record) to prevent other drivers from following his lead in the protected concerted activity.

Accordingly, I find that the clear preponderance of the evidence shows that limousine driver Conway's participation in concerted activity protected under Section 7 of the Act was the sole reason that the Company discharged him for "insubordination," and that he would not have been discharged in the absence of this

protected concerted activity. I therefore find that the November 12 discharge, effective November 9, violated Section 8(a)(1) of the Act. In view of this finding, I do not deem it necessary to rule on the allegation that the discharge also violated Section 8(a)(3).

Conclusions of Law

By discharging Paul Conway November 9, 1981, for engaging in protected concerted activity, the Company engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in an unfair labor practice, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unlawfully discharged an employee, it must offer him resinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in F. W. Woolworth Co., 90 NLRB 289 (1950), plus interest as computed in Florida Steel Corp., 231 NLRB 651 (1977).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Airlines Transportation Company, Pittsburgh, Pennsylvania,

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[2]If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and become its findings, conclusions, and Order, and all objections to them shall be deemed waived for all purposes.

its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging any employee for engaging in protected concerted activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Paul Conway immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of his discharge, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharge and notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facilities in Pittsburgh, Pennsylvania, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 6,

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[3]If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD " shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. March 15, 1983.

s/Marion C. Ladwig
Marion C. Ladwig
Administrative Law Judge

CERTIFICTION OF SERVICE

I, George W. Jacoby, Esquire, hereby certify that I served a true and correct copy of the within Petition for Writ of Certiorari upon the following by United States Mail, postage prepaid, on the 4th day of November, 1986.

Solicitor General (3 copies)
Department of Justice
Washington, DC 20530

Elliott Moore (3 copies)
Deputy Associate General Counsel
Stephen C. Smith, Esq.
National Labor Relations Board
Office of the General Counsel
Washington, D.C. 20570

Date: 11-4-86

George W. Jacoby, Esq.
Attorney for Petitioner

No. 86-766

In the Supreme Court of the United States

OCTOBER TERM, 1986

AIRLINES TRANSPORTATION COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board properly found that petitioner violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by discharging an employee for asserting his collectively bargained right to take a lunch break.

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In the Supreme Court of the United States

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is unreported. The decision and order of the National Labor Relations Board (App., *infra,* 1a-5a), including the decision of the administrative law judge (Pet. Ap. 3a-29a), are reported at 277 N.L.R.B. No. 37.

JURISDICTION

The judgment of the court of appeals (Pet. App. 2a) was entered on August 7, 1986. The petition for a writ of certiorari was filed on November 5, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, Airlines Transportation Company, operates a limousine service that transports passengers between various locations in Pittsburgh and the Pittsburgh airport (Pet. App. 4a). During the relevant time period,

the collective bargaining agreement that petitioner had negotiated with its limousine drivers' collective bargaining representative, Local 128, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("the Union"), provided that " 'employees *will have* a non-paid one-half (1/2) hour lunch period to be taken between the fourth and sixth hours of work' " (App., *infra,* 3a (emphasis in original)). Petitioner had sometimes asked its drivers to work through all or part of this lunch period for additional pay (Pet. App. 5a-6a), but the drivers were entitled to refuse the request and to take the lunch break provided by the contract (*id.* at 6a-7a).

On November 6, 1981, one of petitioner's drivers, Paul Conway, began work at 1:15 p.m. and was therefore entitled to take a 30-minute lunch break between 5:15 p.m. and 7:15 p.m. (Pet. App. 7a). At 5:45 p.m., Conway arrived at the Sheraton South Hotel in Pittsburgh to pick up a scheduled passenger (*ibid.*). He could not find the passenger, so he called the dispatcher, at about 6:05 p.m, and told him that the passenger was a "no-show" (*ibid.*). The dispatcher instructed Conway to return to the airport (*ibid.*). When Conway returned to his limousine, however, he discovered that the passenger finally had arrived (*ibid.*). The passenger requested that Conway wait a few minutes so that he could finish his dinner, which Conway agreed to do (*ibid.*). While waiting for the passenger, Conway made a phone call (*ibid.*). When the passenger finished his dinner, Conway drove him to the airport, arriving at approximately 6:55 p.m. (*id.* at 8a).

Shortly after Conway arrived, the dispatcher, John Koehler, asked him to drive a group of passengers to the hotel at 7:00 p.m. (Pet. App. 8a). Conway refused to do so, stating that, " 'I'd like my lunch hour' " (App., *infra,* 3a (emphasis deleted from original)). Keohler protested that the passengers would have to take a taxicab to the hotel if

Conway did not drive them (*ibid.*), to which Conway replied, " 'Do what you want with them, cab them or helicopter or whatever, *I'd like my lunch hour, I'm due for lunch*' " (*ibid.* (emphasis in NLRB Decision)). He added that, if he waived his lunch period, his final trip would entail overtime and, given that other drivers were on lay-off, he did not like having to work overtime (Pet. App. 8a).

Fifteen minutes later, while Conway was still on his lunch break, the supervisory dispatcher, John Colosimo, approached him and requested that he take the passengers to the hotel (App., *infra,* 3a). Conway again refused, reiterating that he "*wanted [his] lunch hour because the contract says that it's due between four and six hours*" (*ibid.* (emphasis in NLRB Decision)). By the time Conway finished his lunch break, the passengers were no longer there (Pet. app. 9a). Accordingly, the dispatcher sent him back to the hotel to make the 8:00 p.m. return trip to the airport (*ibid.*).

Three days later, petitioner suspended Conway for taking the lunch break and for refusing to make the requested trip (Pet. App. 9a). Then, on November 12, 1981, after meeting with Conway and representatives of the Union, petitioner formally discharged him (*id.* at 10a-12a).

2. Conway filed an unfair labor practice charge with the National Labor Relations Board ("Board") (Pet. App. 3a). The Board held that petitioner violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by discharging Conway for engaging in the "protected," "concerted activity" of insisting on his contractual right to take a lunch break (App., *infra,* 1a-5a). Relying on this Court's decision in *NLRB* v. *City Disposal Systems, Inc.*, 465 U.S. 822 (1984),[1]

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[1] An administrative law judge ("ALJ") initially determined that Conway was protesting on behalf of all of petitioner's drivers the fact that he was doing work of laid-off employees and that his discharge was unlawful under the rationale of *Mushroom Transportation Co.* v.

the Board noted that, "[t]o establish concertedness * * *, it is sufficient that an employee complaint communicate a reasonably perceived violation of a collective-bargaining agreement" (App., *infra,* 4a). It further found that, "[w]here, as here, the employee makes explicit reference to the contractual provision supporting his claim, there can be little question but that the employee is actively pursuing enforcement of that provision" (*ibid.*). Accordingly, "[i]n view of the protected character of this activity" (*ibid.* (footnote omitted)), and the fact "that this activity was the motivating factor in Conway's discharge" (*ibid.*), the Board held that petitioner's actions violated Section 8(a)(1) of the Act and ordered, *inter alia,* that petitioner offer Conway reinstatement and back pay (App., *infra,* 4a; see also Pet. App. 27a).

3. In an unpublished opinion, the court of appeals upheld the Board's decision and enforced its order (Pet. App. 1a-2a).

ARGUMENT

The Board's decision, upheld by the court of appeals, is correct. It is consistent with this Court's decision in *NLRB* v. *City Disposal Systems, supra,* and does not conflict with the decision of any other court of appeals. Accordingly, further review by this Court is not warranted.

1. In *City Disposal,* this Court held that "the assertion by an individual * * * of a right grounded in a collective-bargaining agreement" may constitute "concerted activity" (465 U.S. at 825 (footnote omitted)), "[a]s long as the employee's statement or action is based on a reasonable and honest belief that he is being, or had been, asked to perform a task that he is not required to perform under his collective-bargaining agreement, and the statement or ac-

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NLRB, 300 F.2d 836 (3d Cir. 1964). See Pet. App. 22a-23a. This Court subsequently decided the *City Disposal* case, however, and the Board did not rely on the ALJ's rationale in forming its judgment. See App., *infra,* 2a.

tion is reasonably directed toward the enforcement of a collectively bargained right" (*id.* at 837). Here, the Board, affirmed by the court of appeals, found that Conway had made such an assertion. See App., *infra,* 3a-4a. Specifically, the Board found that Conway told petitioner's officials that "[t]he contract says that I'm due for lunch" (*id.* at 3a), that Conway "reasonably perceived" that these officials' actions constituted a "violation of [the] collective-bargaining agreement" (*id.* at 4a), and that Conway was "pursuing enforcement of [the contract] provision" when he made "explicit reference to [it]" (*ibid.*). This Court has indicated that it will not reexamine such factual findings after they have been affirmed by a court of appeals. See *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 491 (1951). Accordingly, "there is no justification for overturning the Board's judgment that the employee [was] engaged in concerted activity" (*NLRB* v. *City Disposal Systems,* 465 U.S. at 837).

2. In any event, petitioner's contention (Pet. 10-13) that Conway's action was "unreasonable" and thus not "concerted" is meritless. While Conway did take time at the hotel to make a personal phone call, he did so while he was waiting for a passenger to finish dinner; thus, Conway did not, as petitioner asserts (Pet. 10-11), have sufficient time both to take a lunch break and to be ready for a 7:00 p.m. trip. Furthermore, while Conway did say (Pet. 11-12) that he would not waive his lunch break because other drivers were on layoff, the Act clearly protects a single employee's invocation of collectively bargained rights "regardless of whether the employee has his own interests most immediately in mind" (*City Disposal,* 465 U.S. at 830). Finally, there is absolutely nothing in the record to support petitioner's claim (Pet. 13) that Conway was setting the stage for an "early quit"; the record shows only that Conway was between his fourth and sixth hours of

work and that he wanted his lunch break. Thus, even if this Court were inclined to reexamine the Board's findings, the Board's judgment is supported by the record here.

3. There is likewise no merit to petitioner's contention (Pet. 14-17) that Conway's action was not "protected" by Section 7 of the Act because it constituted an unauthorized "work stoppage." Cf. *City Disposal,* 465 U.S. at 837 ("[i]n general, if an employee violates [a no-strike] provision, his activity is unprotected even though it may be concerted"). Conway did not breach any "no-strike" clause or any other provision of petitioner's contract with the Union. Rather, he exercised his contractual right to take his lunch break *and* to refuse his employer's request that he work through it. See Pet. App. 6a-7a. Thus, as the Board explained in *General Motors Corp.,* 261 N.L.R.B. 516, 519 (1982) (cited by the Board here, see App., *infra,* 4a n.4), Conway "was not refusing to work in protest of a working condition, but was asserting a right to leave for a specific purpose explicitly covered by contract provisions." That is not a "work stoppage," but rather a "protected" activity under the Act. See *City Disposal System, Inc.,* v. *NLRB,* 766 F.2d 969, 974 (6th Cir. 1985) (on remand from this Court, court of appeals finds that employee had contractual right to refuse to drive a truck that he believed was unsafe and thus was engaging in "protected" activity).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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Solicitor General

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DECEMBER 1986

APPENDIX A

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 6–CA–15129

AIRLINES TRANSPORTATION COMPANY

AND

PAUL CONWAY, AN INDIVIDUAL

DECISION AND ORDER

On 15 March 1983 Administrative Law Judge Marion C. Ladwig issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions for the reasons set forth below and to adopt the recommended Order.

As more fully set forth in the attached decision, the judge found, and we agree, that the Respondent violated Section 8(a)(1) by discharging Paul L. Conway from his

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[1] The Respondent has exceped to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

job as airport limousine driver for engaging in protected concerted activity. The judge found that on 6 November 1981[2] Conway insisted on taking his full lunchbreak in order to make the point to management that drivers were doing the work of four men who had been laid off during the air traffic controllers' strike. The judge concluded that this protest was related to group action in the interest of all the drivers and that, in discharging Conway, management recognized it as such. The judge held that the Respondent violated Section 8(a)(1) by discharging Conway for engaging in concerted activity for the purpose of mutual aid or protection. We find a more compelling rationale for the judge's conclusion grounded in the Board's *Interboro*[3] doctrine, approved by the Supreme Court in *NLRB v. City Disposal Systems,* 104 S.Ct. 1505 (1984).

In *City Disposal*, which issued after the judge's decision in this case, the Court held that an employee's "honest and reasonable invocation" of a collectively bargained right is concerted activity. In so holding, the Court recognized that, although the processing of a grievance is the principal means for invoking rights conferred through collective bargaining.

> [i]n practice . . . there is unlikely to be a bright-line distinction between an incipient grievance, a complaint to an employer, and perhaps even an employee's initial refusal to perform a certain job that he believes he has no duty to perform. It is reasonable to expect that an employee's first response to a situation that he believes violates his collective bargaining agreement will be a protest to his employer. [Id. 104 S.Ct. 1513-1514.]

Article IV of the collective-bargaining agreement covering the Respondent's limousine drivers provides, inter alia,

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[2] All dates are in 1981.

[3] *Interboro Contractors*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967).

that "employees *will have* a non-paid one-half (½) hour lunch period to be taken between the fourth and sixth hours of work." (Emphasis added.) Describing his arrival at the airport at 6:55 p.m., his sixth hour of work, Conway credibly testified about his conversation with dispatcher John Koehler as follows:

> As I approached the phone John came around the corner and I told him I had one passenger. And then John said he wanted me to make the seven o'clock pull back to Mt. Lebanon, back to Sheraton South and I asked John I said, "No, *I'd like my lunch hour.*" and Koehler says, "I have some people over there, I'll have to cab them." And I said, "Do what you want with them, cab them or helicopter or whatever, *I'd like my lunch hour, I'm due for lunch.*" The contract says that I'm due for lunch between the fourth and sixth hours, and it was getting near the end of my sixth hour and I hadn't even started lunch. [Emphasis added.]

Conway proceeded to relate to Koehler his displeasure that he and other drivers were being pressured to work overtime during a period of employee layoffs. Conway explained that, had he waived his lunch period as the dispatcher had urged, his final trip of the day would have entailed overtime, which the Respondent concedes was not mandatory for drivers.

Supervisory Dispatcher John Colosimo approached Conway about halfway through his lunch period and again requested that he resume driving. Conway testified that his response was "that I didn't feel that I should do this with men laid off because *I wanted my lunch hour because the contract says that it's due between four and six hours.*" (Emphasis added.) During an investigative interview 6 days later, Conway was asked what point he was trying to make by insisting on lunch. When he responded, "I don't feel we should have to work overtime when men are laid

off," company President Jones Sinnot told him, "You've proved your point. You no longer work for this Company." Teamsters Local 128 President William Carson, present at the meeting, reminded Sinnott of Conway's contractual entitlement to his lunchbreak. Sinnott resolved, however, to proceed with the discharge. Subsequently, in a letter to Carson, the Respondent specifically referred to Conway's insistence on his lunch hour in stating the grounds for discharge.

To establish concertedness under *City Disposal*, it is sufficient that an employee complaint communicate a reasonably perceived violation of a collective-bargaining agreement. Where, as here, the employee makes explicit reference to the contractual provision supporting his claim, there can be little question but that the employee is actively pursuing enforcement of that provision. In view of the protected character of this activity,[4] and in further view of the judge's findings, which we adopt, that this activity was the motivating factor in Conway's discharge, we find that Respondent's action violated Section 8(a)(1).[5]

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[4] See *Bunney Bros. Construction Co.*, 139 NLRB 1516, 1519 (1962); *General Motors Corp.*, 261 NLRB 516 (1982).

[5] Consistent with the judge's decision, we find it unnecessary, in light of the 8(a)(1) finding, to pass on the related 8(a)(3) allegations of the complaint.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Airline Transportation Company, Pittsburgh, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. 8 November 1985

Donald L. Dotson, Chairman

Patricia Diaz Dennis, Member

Wilford W. Johansen, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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